



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 216

RIN 0750-AG66

**Defense Federal Acquisition Regulations Supplement;
Notification Requirements for Awards of Single-Source Task- or
Delivery-Order Contracts (DFARS Case 2009-D036)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement the National Defense Authorization Act for Fiscal Year 2010 regarding the notification requirements to Congress when awarding a single-award task- or delivery-order contract in excess of \$103 million.

DATES: *Effective date: [Insert date of publication in the Federal Register].*

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, telephone 703-602-8383.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule at 75 FR 40716 on July 13,

2010, to implement section 814 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010, (Pub. L. 111-84, enacted October 28, 2009). The public comment period closed on September 13, 2010. Three respondents submitted comments in response to the interim rule.

The interim rule requires the head of the agency to notify the congressional defense committees within 30 days after any determination made under FAR 16.504(c)(ii)(D)(1), and to provide a copy of the determination and notification to the Deputy Director, Defense Procurement and Acquisition Policy. If the single-award task- or delivery-order contract award concerns intelligence or intelligence-related activities of DoD, notification shall also be provided to the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives.

II. Discussion and Analysis of Public Comments

A discussion of the comments received and the changes made to the final rule as a result of those comments are provided as follows:

A. Analysis of public comments.

Comment: Two respondents wrote that the interim rule's preamble was confusing and would lead to misinterpretations. One of the respondents stated that "(t)here is a difference between a 'single-source' and a 'sole-source'." Further, the

respondent stated that the "Indefinite Quantity Contract itself is the subject of DFARS 216.505, not the resulting delivery or task orders issued under the contract."

Response: The respondent correctly states that there is a difference between single-source and sole-source, and the preamble of this final rule clarifies the intent of the rule by using the terms "single-award" or "single-source" contracts, as used in the statute, in lieu of sole-source. In response to the other comment, individual task orders and delivery orders are the subject of DFARS 216.505, Ordering; however, this rule addresses limitations on single-award contracts, and DoD confirms that the rule text is correctly located at DFARS 216.504, Indefinite Quantity Contracts.

Comment: A respondent requested that the preamble to the interim rule be amended to add "contract" or "contracts" where appropriate in order to better convey the intent of the existing and new regulations. The preamble for the interim rule appears to this respondent to change the reporting requirement from "task or delivery order contracts" to "task or delivery orders."

Response: In response to the first comment, the title of this final rule has been amended to include "Contracts" in the title to more clearly convey the intent of the rule. Concerning the second comment, the agency-head determination and congressional notification are required, in accordance with 10

U.S.C. 2304a(d)(3), only for single-source indefinite-delivery contracts estimated to exceed \$100 million (now \$103 million). DoD has reviewed and confirms that the interim rule changes at DFARS 216.504(c)(1)(ii)(D) correctly implemented the statutory requirements for single-source contracts, notwithstanding minor clarifications made in this final rule concerning reporting requirements.

Comment: A respondent pointed out that there is a "disconnect" between the interim rule published in the Federal Register and the on-line version of the DFARS. The on-line version includes, at the end of DFARS 216.504(c)(1)(ii)(d)(2), the sentence "A copy of any determination made in accordance with FAR 16.504(c)(1)(ii)(D) shall be submitted to: Deputy Director, Defense Procurement (Contract Policy and International Contracting), OUSD(AT&L)DPAP(CPIC), 3060 Defense Pentagon, Washington, DC 20301-3060." The respondent notes that this appears to duplicate the same statement that is made earlier in the same paragraph.

Response: In response to this comment, the rule text format, numbering, notification and reporting requirements are clarified in this final DFARS rule and in changes made to the DFARS Procedures Guidance and Information. Agency heads are required to provide a copy of each determination and congressional notification to the Office of the Under Secretary

of Defense (Acquisition, Technology, and Logistics) Defense Procurement and Acquisition Policy (DPAP) Contract Policy and International Contracting (CPIC). This enables a single office to oversee and manage the DoD-wide use of single-award task- and delivery-order contracts.

Comment: A respondent submitted an editorial comment, asking that DoD add "216.504, Indefinite-quantity contracts" with a link to DFARS 216, Table of Contents.

Response: The ability to hyperlink is available in the HTML version of each DFARS subpart.

B. Other Changes.

The final rule at DFARS 216.504(c)(1)(ii)(D) (i) is revised to clarify that the authority to make any determination authorized by FAR 16.504(c)(1)(ii)(D) (1) shall not be delegated below the level of the senior procurement executive. Previously, this limitation on the delegation of approval authority only applied to determinations made because it was necessary in the public interest to award the contract to a single source due to exceptional circumstances, and these determinations had to be reported to Congress. Since the statute and the resultant interim rule expand the reporting requirement to require that any determination made under FAR 16.504(c)(1)(ii)(D) (1) be reported to Congress, the limitation

on delegation of approval authority is revised to be commensurate with the expanded reporting requirement.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the change solely impacts internal Government operating procedures and will therefore not have a significant cost or administrative impact on contractors, subcontractors, or offerors. The notification requirements are

within DoD and between DoD agencies and the Congress. An initial regulatory flexibility analysis was not performed. No comments were received from small entities on this rule.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 216

Government procurement.

Mary Overstreet

Editor, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System confirms as final the interim rule published at 75 FR 40716 on July 13, 2010, with the following changes:

PART 216 - TYPES OF CONTRACTS

1. The authority citation for 48 CFR part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Revise section 216.504 to read as follows:

216.504 Indefinite-quantity contracts.

(c)(1)(ii)(D) *Limitation on single-award contracts.*

(i) The authority to make the determination authorized in FAR 16.504(c)(1)(ii)(D) (1) shall not be delegated below the level of the senior procurement executive.

(ii) The head of the agency must notify the congressional defense committees within 30 days after making any determination under FAR 16.504(c)(1)(ii)(D) (1). If the award concerns intelligence or intelligence-related activities of DoD, notification shall also be provided to the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives. (See sample notification at PGI 216.504(c)(1)(ii)(D) (iv).)

(iii) A copy of each determination made in accordance with FAR 16.504(c)(1)(ii)(D) and each congressional notice shall be submitted in accordance with PGI 216.504(c)(1)(ii)(D) (iii).

[FR Doc. 2011-29903 Filed 11/17/2011 at 8:45 am; Publication Date: 11/18/2011]